

Joseph N. Kravec, Jr. (*Admitted Pro Hac Vice*)
 SPECTER SPECTER EVANS
 & MANOGUE, P.C.
 The 26th Floor Koppers Building
 Pittsburgh, Pennsylvania 15219
 Tel: (412) 642-2300
 Fax: (412) 642-2309
 E-mail: jnk@ssem.com

Michael D. Braun (167416)
 BRAUN LAW GROUP, P.C.
 12304 Santa Monica Blvd., Suite 109
 Los Angeles, CA 90025
 Tel: (310) 442-7755
 Fax: (310) 442-7756
 E-mail: service@braunlawgroup.com

Ira Spiro (67641)
 J. Mark Moore (180473)
 SPIRO MOSS BARNES, LLP
 11377 West Olympic Blvd., Fifth Floor
 Los Angeles, CA 90064-1683
 Tel: (310) 235-2468
 Fax: (310) 235-2456
 E-mail: ira@spiromoss.com
mark@spiromoss.com

Janet Lindner Spielberg (221926)
 LAW OFFICES OF JANET
 LINDNER SPIELBERG
 12400 Wilshire Blvd., Suite 400
 Los Angeles, CA 90025
 Tel: (310) 392-8801
 Fax: (310) 278-5938
 E-mail: jlspielberg@jlspl.com

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION**

FELTON A. SPEARS, JR. and SIDNEY
 SCHOLL, on behalf of themselves and all
 others similarly situated,

Plaintiffs,

v.

WASHINGTON MUTUAL, INC., a
 Washington corporation; WASHINGTON
 MUTUAL BANK, FA (a/k/a
 WASHINGTON MUTUAL BANK); FIRST
 AMERICAN EAPPRAISEIT, a Delaware
 corporation; and LENDER'S SERVICE,
 INC.,

Defendants.

CASE NO.: 5:08-CV-00868 (RMW)

CLASS ACTION

**NOTICE OF MOTION; MOTION AND
 SUPPORTING MEMORANDUM FOR
 JURISDICTIONAL DISCOVERY**

Date: August 15, 2008
 Time: 9:00 a.m.
 Place: Courtroom 6, 4th Floor
 280 South 1st Street
 San Jose, CA 95113

Honorable Ronald M. Whyte

NOTICE OF MOTION AND MOTION

TO ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on August 15, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 6, 4th Floor, of the above-entitled Court, located at 280 South 1st Street, San Jose, CA 95113, before the Honorable Ronald M. Whyte, Plaintiffs Felton A. Spears, Jr. and Sidney Scholl will move the Court for the entry of an Order to allow jurisdictional discovery to be taken regarding Plaintiffs' standing to pursue an action against Defendant LSI Appraisal, LLC (f/k/a Lender's Service, Inc.) ("LSI").

Plaintiffs seek, in the alternative to this Court's denying LSI's Motion to Dismiss Plaintiffs' First Amended Complaint for lack of Article III standing, to take discovery related to LSI's participation and role, if any, in Plaintiffs' appraisals and the alleged conspiracy with co-defendants Washington Mutual Bank, FA and First American eAppraiseIT which are subject to the above-captioned action. This Motion is supported by the Affidavit of Joseph N. Kravec, Jr. in Support of Plaintiffs' Motion for Jurisdictional Discovery, the documents filed in this action, and relevant federal law.

BRIEF AND POINTS OF AUTHORITY

Plaintiffs, by their undersigned counsel, respectfully submit this Brief and Points of Authority in support of their Motion for Jurisdictional Discovery in the alternative to this Court's outright denial of Defendant Lender's Services, Inc.'s, n/k/a LSI Appraisal, LLC ("LSI") Motion to Dismiss: and Memorandum in Support of Motion to Dismiss ("Motion to Dismiss") filed on May 2, 2008.

INTRODUCTION

Plaintiffs have brought this putative class action against Defendants LSI, Washington Mutual Bank, FA ("WaMu"), and First American eAppraiseIT ("EA") for their roles in the conspiracy to inflate home mortgage appraisal values across the United States. To support their claim that Defendants entered into an illegal conspiracy, Plaintiffs have provided evidence from the New York Attorney General's complaint against First American eAppraiseIT indicating each of the three coconspirators were willing participants in the scheme, and the appraisal report for Plaintiff Sidney Scholl which identifies all three Defendants, including LSI, as parties to the appraisal. This evidence shows Plaintiffs have proper Article III jurisdiction over each Defendant.

Even though no discovery has been taken to determine each Defendants' role in preparing, reviewing, and publishing Plaintiffs' appraisals and each Defendants' role in the alleged conspiracy, LSI seeks to have Plaintiffs' action against it dismissed under the premise that it played no role whatsoever in Plaintiffs' appraisals. LSI's Motion to Dismiss, Memorandum and Points of Authorities ("LSI's Brief"), pp. 6-8. The only supporting "evidence" it has produced to support this blunderbuss claim is the affidavit of its Executive Vice President of Appraisal Operations who fails to deny that LSI received, reviewed, or changed Plaintiffs' appraisals. Affidavit of Kathleen M. Rice In Support [sic] Motion to Dismiss Amended Complaint ("Rice Aff."), ¶¶ 6, 10, 12, 14-15. However, as no discovery has been taken in this action, and there is conflicting evidence regarding whether LSI played a role in Plaintiffs' appraisals, a genuine dispute regarding jurisdiction exists. Therefore, this Court should allow Plaintiffs to take discovery to determine whether Article III jurisdiction exists prior to dismissing their action based on LSI's assertion that Plaintiffs lack standing. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir.1977).

FACTUAL BACKGROUND

On March 28, 2008, Plaintiffs filed their First Amended Complaint in this action alleging Defendants LSI, WaMu, and EA conspired together to raise the value of WaMu's mortgage loan portfolio through LSI and EA providing falsified appraisal reports which inflate the value of borrowers' properties. First Amended Complaint, ¶ 6. Plaintiffs allege the actions of the conspiracy, and each Defendant by virtue of their participation therein, have harmed both Plaintiffs and a class of all persons who borrowed money from WaMu while the conspiracy was in operation. *Id.*, ¶¶ 7, 56. Plaintiffs allege they were damaged as the result of the conspiracy by virtue of paying for counterfeit appraisals. *Id.*, ¶¶ 7, 56, 82, 98, 104, 109-110, 123, 126-127.

On May 2, 2008, LSI filed its Motion to Dismiss Plaintiffs' First Amended Complaint, in part based on Rule 12(b)(1), alleging Plaintiffs lack standing to pursue an action against them. LSI's Brief, pp. 6-8. To support its Motion, LSI's counsel argues that "LSI played no role whatsoever in the real estate transactions at issue in this action," and "that LSI had absolutely no involvement with or connection to the appraisals at issue in this suit." LSI's Brief, pp. 4, 8. To support its counsel's contentions, LSI submitted the Affidavit of Ms. Kathleen M. Rice, LSI's Executive Vice President of Appraisal Operations for LSI. Rice Aff., ¶ 1.

Ms. Rice attests that she had a search conducted in LSI's databases "for any and all appraisal reports relating to [Plaintiffs] and the properties that are at issue in the Amended Complaint," but does not state if any appraisal reports for Plaintiffs or their properties were discovered. Rice Aff., ¶ 3. Ms. Rice does attest that LSI "had not prepared any appraisal report" for the properties owned by Mr. Spears or Ms. Scholl, and that "LSI was not able to find any appraisal report completed by LSI" for Ms. Scholl's property. Rice Aff., ¶¶ 6, 10, 12, 14-15 (emphasis added). Ms. Rice does not attest whether LSI received, reviewed, or otherwise affected either Plaintiffs' appraisals.

On June 25, 2008, Plaintiffs submitted Plaintiff Sidney Scholl's appraisal report. Affidavit of Joseph N. Kravec, Jr. in Support of Plaintiffs' Responses in Opposition to Defendants' Motions to Dismiss, Exhibit 2 ("Scholl Report"). This report was attached to Plaintiffs' original Class Action Complaint in this lawsuit, and is referenced specifically in Plaintiffs' First Amended Complaint. ¶ 59. The Scholl Report identifies LSI as the appraiser's "CLIENT" for Plaintiff Scholl's appraisal. Scholl

Report, p. 6; *see also* Kravec Aff., ¶ 5 (verifying that the email address identified as the appraiser's client's address belongs to LSI). Ms. Rice acknowledges she reviewed the Scholl Report, notes that "the appraisal was completed on behalf of eAppraiseIT," and attests that Defendant EA has no corporate relationship to LSI or its parent company. Rice Aff., ¶ 8.

Ms. Rice fails to acknowledge or deny that LSI received Ms. Scholl's appraisal, or to explain why LSI received it if LSI did not prepare or complete the report. Additionally, neither Ms. Rice nor LSI's counsel have provided any specific evidence supporting LSI's counsel's claims that "LSI played no role whatsoever in the real estate transactions at issue in this action," or "that LSI had absolutely no involvement with or connection to the appraisals at issue in this suit." LSI's Brief, pp. 4, 8. Instead, Plaintiffs have provided conflicting evidence, in the form of Plaintiff Scholl's appraisal report, which suggests LSI did have a role or some involvement with Plaintiff's appraisal. Scholl Report, p. 6.

ARGUMENT

Article III standing is required to establish a justiciable case or controversy within the jurisdiction of the federal courts. *Gerlinger v. Amazon.com Inc., Borders Group, Inc.*, 526 F.3d 1253, 1256 (9th Cir. 2008). "To satisfy constitutional standing, plaintiffs bear the burden of showing they meet three requirements: (1) they suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of defendant; and (3) it is 'likely,' as opposed to 'speculative,' that the injury will be redressed by a favorable decision." *Tyler v. Cuomo*, 236 F.3d 1124, 1131-32 (9th Cir. 2000), *citing* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007), *citing* *Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir.2001).

As explained more fully in Plaintiffs' Brief in Opposition LSI's Motion to Dismiss, Plaintiffs have properly alleged they were damaged directly from LSI's willing participation in the conspiracy with WaMu and EA to provide unlawful, incredible appraisals to Plaintiffs. *See* Plaintiffs' Memorandum in Opposition to LSI's Motion to Dismiss, Section I.B. This conspiracy is evidenced by the allegations in Plaintiffs complaint which quotes emails from the New York Attorney General's complaint showing specific evidence of LSI's participation in the conspiracy. First Amended Complaint, ¶¶ 43, 53. The conspiracy is further evidenced by Plaintiff Scholl's appraisal report which

1 identifies each of the three Defendants as “clients” for the same appraisal. Scholl Report, p. 6.
2 Jurisdiction is therefore proper against LSI as it is listed as the appraiser’s client on the Scholl Report,
3 and for its role as a co-conspirator in the alleged scheme. *Applied Equipment Corporation v. Litton*
4 *Saudi Arabia Limited*, 869 P.2d 454, 510-511 (Cal. 1994)(under California law, liability is imposed “on
5 persons who, although not actually committing a tort themselves, share with the immediate tortfeasors
6 a common plan or design in its perpetration”).

7 Even though Plaintiffs’ allegations, the law, and the facts adduced prior to any formal discovery
8 being taken all support finding Plaintiffs have standing over LSI, LSI’s counsel argues that Plaintiffs
9 cannot trace any injuries they allegedly suffered to LSI’s conduct. LSI’s Brief, pp. 2, 7. LSI’s counsel
10 asserts “LSI played no role whatsoever in the real estate transactions at issue in this action,” and “that
11 LSI had absolutely no involvement with or connection to the appraisals at issue in this suit.” LSI’s
12 Brief, pp. 4, 8. LSI’s counsel presumably relies on the testimony of LSI’s Executive Vice President of
13 Appraisal Operations. *See Rice Aff.*, ¶ 3. LSI’s submission of Ms. Rice’s Affidavit is a factual
14 challenge to jurisdiction, and Plaintiffs should be permitted discovery to refute LSI’s thus-far
15 unsupported contentions. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2004).

16 In the Ninth Circuit, “where pertinent facts bearing on the question of jurisdiction are in dispute,
17 discovery should be allowed.” *Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th
18 Cir.1989)(citing *Wells Fargo & Co.*, 556 F.2d 406, 430-31, n. 24 (9th Cir.1977)). It is reversible error
19 when a district court refuses to grant jurisdictional discovery unless “it is clear that further discovery
20 would not demonstrate facts sufficient to constitute a basis for jurisdiction.” *Wells Fargo & Co.*, 556
21 F.2d at 430-31, n. 24. For a district court within the Ninth Circuit to dismiss a plaintiff’s claim for lack
22 of Article III standing on a factual challenge, the defendant must produce “conclusive evidence” to
23 justify denial of jurisdictional discovery. *Farr v. U.S.*, 990 F.2d 451, 454 (9th Cir.1993).

24 Here, LSI fails to produce any evidence supporting its counsel’s statement “that LSI had
25 absolutely no involvement with or connection to the appraisals at issue in this suit.” LSI’s Brief, p.8.
26 The only specific evidence in this case so far is Plaintiffs’ appraisal reports, one of which specifically
27 identifies LSI as a “client” and as having received the appraisal. Scholl Report, p. 6. The only
28 “evidence” LSI has presented to the Court is its affiant’s statement which only states LSI did not

1 “prepare” or “complete” appraisals for Plaintiffs. *Id.*, 6, 10, 12, 14-15. LSI offers no evidence to deny
 2 that it received, reviewed, changed, or affected either Plaintiffs appraisal reports in some way, or that
 3 it participated in the appraisal scheme as alleged in Plaintiffs’ First Amended Complaint at ¶¶ 6-9, 35-
 4 39, 42-43, 53-54, 56.

5 Where, as here, it is certainly not clear “that further discovery would not demonstrate facts
 6 sufficient to constitute a basis for jurisdiction,” discovery must be allowed to determine if Plaintiffs
 7 have standing. *Wells Fargo & Co.*, 556 F.2d at 430-31, n. 24. LSI’s counsel’s conclusory statements
 8 “that LSI had absolutely no involvement with or connection to the appraisals at issue in this suit,”
 9 unsupported by any evidence, including LSI’s own affiant, is clearly not the “conclusive evidence” the
 10 Ninth Circuit requires for Plaintiffs’ action to be dismissed on jurisdictional grounds prior to discovery
 11 being taken. *Farr*, 660 F.2d at 454.

12 CONCLUSION

13 For the foregoing reasons, Plaintiffs respectfully request that if the Court does not dismiss LSI’s
 14 Motion to Dismiss based on Rule 12(b)(1) outright, that Plaintiffs be allowed to take discovery
 15 regarding jurisdictional issues. Accordingly, Plaintiffs have submitted a list of topics for discovery to
 16 determine LSI’s role in the alleged conspiracy and what role LSI had in Plaintiffs’ appraisals. Kravec
 17 Aff., ¶ 9.

18 Dated: June 25, 2008

**SPECTER SPECTER EVANS &
MANOGUE, P.C.**

20 By: s/Joseph N. Kravec, Jr.
Joseph N. Kravec, Jr.

21 The 26th Floor Koppers Building
 22 Pittsburgh, Pennsylvania 15219
 23 Tel: (412) 642-2300
 Fax: (412) 642-2309
 E-mail: jnk@ssem.com

24 Michael D. Braun, Esquire
 25 **BRAUN LAW GROUP, P.C.**
 12304 Santa Monica Blvd., Suite 109
 26 Los Angeles, CA 90025
 27 Tel: (310) 442-7755
 Fax: (310) 442-7756
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1 Ira Spiro (67641)
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3 **SPIRO MOSS BARNES, LLP**
4 11377 West Olympic Blvd., Fifth Floor
5 Los Angeles, CA 90064-1683
6 Tel: (310) 235-2468
7 Fax: (310) 235-2456
8 E-mail: ira@spiromoss.com
9 mark@spiromoss.com

10 Janet Lindner Spielberg (221926)
11 **LAW OFFICES OF JANET**
12 **LINDNER SPIELBERG**
13 12400 Wilshire Blvd., Suite 400
14 Los Angeles, CA 90025
15 Tel: (310)3928801
16 Fax: (310)278-5938
17 E-mail: jlspielberg@jlspl.com

18 *Attorneys for Plaintiffs*
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } ss.:

I am employed in the County of Allegheny, State of Pennsylvania. I am over the age of 18 and not a party to the within action. My business address is The 26th Floor Koppers Building, Pittsburgh, Pennsylvania 15219.

On June 25, 2008, using the Northern District of California's Electronic Case Filing System, with the ECF ID registered to Joseph N. Kravec, Jr., I filed and served the document(s) described as:

**NOTICE OF MOTION; MOTION AND SUPPORTING
MEMORANDUM FOR JURISDICTIONAL DISCOVERY**

The ECF System is designed to automatically generate an e-mail message to all parties in the case, which constitutes service. According to the ECF/PACER system, for this case, the parties are served as follows:

Janet Lindner Spielberg, Esquire	jlspielberg@jlsplp.com
Ira Spiro, Esquire	ira@spiromoss.com
Robert Ira Spiro, Esquire	ira@spiromoss.com
J. Mark Moore, Esquire	mark@spiromoss.com
Michael D. Braun, Esquire	service@braunlawgroup.com

Attorneys for Plaintiffs

Robert J. Pfister, Esquire	rpfister@stblaw.com
Martin L. Fineman, Esquire	martinfineman@dwt.com
Stephen Michael Rummage, Esquire	steverummage@dwt.com
Sam N. Dawood, Esquire	samdawood@dwt.com
Jonathan M. Lloyd, Esquire	jonathanlloyd@dwt.com

Attorneys for Defendant Washington Mutual, Inc.

Laura Jean Fowler, Esquire	lfowler@mhalaw.com
----------------------------	--------------------

Attorneys for Defendant eAppraiseIT

Margaret Anne Keane, Esquire	mkeane@dl.com
Kris Hue Chau Man, Esquire	kman@dl.com
Angela M. Papalaskaris, Esquire	apapalas@dl.com
Christopher J. Clark, Esquire	cjclark@dl.com

Kevin C. Wallace, Esquire

kwallace@dl.com

Jeffrey D. Rotenberg, Esquire

jrotenberg@tpw.com

Richard F. Hans, Esquire

rhans@tpw.com

Attorneys for Defendant LSI Appraisal, LLC

On June 25, 2008, I served the document(s) described as:

**NOTICE OF MOTION; MOTION AND SUPPORTING
MEMORANDUM FOR JURISDICTIONAL DISCOVERY**

by placing a true copy(ies) thereof enclosed in a sealed envelope(s) addressed as follows:

Kerry Ford Cunningham, Esquire
Patrick J. Smith, Esquire
Thacher Proffitt & Wood LLP
Two World Financial Center
New York, New York 10281

Attorneys for eAppraiseIT

Kris H. Man, Esquire
Dewey and LeBoeuf LLP
One Embarcadero Center
Suite 400
San Francisco, CA 94111-3619

Attorneys for LSI Appraisal, LLC

I served the above document(s) as follows:

BY MAIL. I am familiar with the firm's practice of collection and processing correspondence by mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Pittsburgh, Pennsylvania in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in an affidavit.

I am employed in the office of an attorney who is admitted *pro hac vice* in this action at whose direction the service was made.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on June 25, 2008, at Pittsburgh, Pennsylvania.

S/MARCIA Z. CARNEY
Marcia Z. Carney

Joseph N. Kravec, Jr. (*Admitted Pro Hac Vice*)
SPECTER SPECTER EVANS
& MANOGUE, P.C.
The 26th Floor Koppers Building
Pittsburgh, Pennsylvania 15219
Tel: (412) 642-2300
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12400 Wilshire Blvd., Suite 400
Los Angeles, CA 90025
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Fax: (310) 278-5938
E-mail: jlspielberg@jlslp.com

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
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FELTON A. SPEARS, JR. and SIDNEY
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Washington corporation; WASHINGTON
MUTUAL BANK, FA (a/k/a
WASHINGTON MUTUAL BANK); FIRST
AMERICAN EAPPRAISEIT, a Delaware
corporation; and LENDER'S SERVICE,
INC.,

Defendants.

CASE NO.: 5:08-CV-00868 (RMW)

CLASS ACTION

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR
JURISDICTIONAL DISCOVERY**

[PROPOSED] ORDER

AND NOW, this ____ day of _____, 2008, upon consideration of Plaintiffs Felton A. Spears' and Sidney Scholls' Motion for Jurisdictional Discovery, and the arguments of the parties with respect thereto, it is hereby ORDERED, ADJUDGED and DECREED that said Motion is hereby GRANTED. Plaintiffs shall be given ninety days from the date of this Order to conduct discovery regarding the issues of standing with regards to Defendant Lender's Service, Inc., and of Lender's Service Inc.'s involvement in the alleged conspiracy with Defendants Washington Mutual Bank, FA and First American eAppraiseIT to inflate appraisal values.

DATED: _____, 2008

RONALD M. WHYTE
United States District Judge